TABLE OF CITATIONS.

	Page
Clean Air Act, 42 U. S. C. § 1857, et seq.	1, 7
3 Corbin on Contracts (1963):	
§ 537	5
§ 538	5
§ 542	3
§ 559	5
Federal Rules of Civil Procedure, Rule 52(a)	6
Md. Stat. Ann., art. 43, §§ 690, 698(1967)	4
United States v. Atlantic Refining Co., 360 U. S. 19 (1959)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

BISHOP PROCESSING CO., A BODY CORPORATE OF THE STATE OF MARYLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER IN REPLY.

In its Petition for Writ of Certiorari, the petitioner presented the following questions of substantial importance:

I. Whether the legal principles governing the interpretation of agreements between private parties apply to court-approved consent agreements? (Petition for Writ of Certiorari, pp. 5-19).

II. Whether thirty-one instances of malodor over a consecutive fourteen-week observation period constitutes as a matter of law a violation of the federal Clean Air Act, 42 U. S. C. § 1857, *et seq.*, without regard for seasonal variations in relevant meteorological conditions (*e.g.*, wind direction and speed, temperature, humidity, and precipita-

tion), the duration of each malodor, the degree of offensiveness of each malodor, and the geographic pervasiveness of each malodor? (Petition for Writ of Certiorari, pp. 19-26).

III. Whether a series of unreasonable time limitations imposed upon petitioner by the federal district court and federal Circuit Court are such as to amount to a deprivation of due process of law? (Petition for Writ of Certiorari, pp. 26-28).

The respondent does not contest that these questions are of substantial importance and that, in consequence, they warrant review by this Court. Respondent's position seems to be that these questions are not presented by the facts.

With respect to the first question, respondent takes the same erroneous position of the district court and court of appeals, *viz.*, petitioner's interpretation of the consent decree must not prevail because (1) it is inconsistent with the "plain" terms of the consent decree and (2) petitioner had "ample opportunity" to include in the decree provisions it felt necessary.

There is no way in which the consent decree can rationally be characterized as "plain" or "unambiguous." The decree is totally silent on the meaning of the crucial words "malodorous air pollution." The courts below have ruled that whatever odor evidence the Director of the Air Pollution Control Division, Delaware Water and Air Resources Commission, finds sufficient is sufficient as a matter of law as long as he says it is sufficient. Seasonal variations in meteorological conditions—wind direction and speed, temperature, humidity, and precipitation—are irrelevant under the decree, although the decree does not say so. The duration of each malodor is irrelevant, although the decree does not say so. The degree of offensiveness of each malodor is irrelevant, although the decree does

not say so. The geographic pervasiveness of each malodor is irrelevant, although the decree does not say so.

The decree is also totally silent on the procedures to be used by the Director in marshalling and evaluating evidence of malodors. Although the decree does not say so, the Director, according to the courts below, had unlimited discretion and was free to be arbitrary in the gathering and analysis of malodor evidence.

The district court effectively prejudged the questions relating to the meaning of the decree. It decided that the decree which it had already accepted and approved had to be "plain" and it refused even to consider evidence to determine whether the decree was plain. This in and of itself is contrary to the principles governing the interpretation of private agreements, 3 Corbin on Contracts, § 542 (1963). Furthermore, the district court's own actions belie its characterization of the decree as "plain." At the first hearing in March 1969, the district court felt the need to inform the Director what the decree required of him (66a-77a). The procedures and standards to be followed were not "plain" to the Director and he had to be "fully apprised of exactly what was expected of him under the consent decree." (66a).

The respondent continues to rely on the district court's certification that petitioner's interpretation of the decree was never communicated to the court. It reasons that since petitioner had ample opportunity to incorporate its interpretation into the decree, petitioner is now estopped. However, this does not follow. Petitioner's failure to come forward with its interpretation of the decree prior to its acceptance by the court is in no way inconsistent with its coming forward subsequent to the entry of the decree. The error in the reasoning of the lower courts and respondent is that they assume petitioner anticipated that the Director

would do what petitioner now claims he should not have done under the decree. Not only did petitioner not anticipate the subsequent action by the Director, but it also had no reason to anticipate such action.

Petitioner assumed that there had been a meeting of the minds as a result of the letter of Mr. Howard Polin, President of petitioner, suggesting settlement. Brief for the United States In Opposition, Appendix 1. This letter showed that petitioner was willing to enter into a consent agreement to avoid a legal determination based on the kind of emotional and exaggerated testimony that resulted from the public odor hearings sponsored by HEW. Petitioner assumed that the letter suggesting settlement made it clear that the Director was (1) to rely on malodor evidence from sources other than HEW personnel and other than Selbyville residents who testified against petitioner at the HEW conference and hearing; and (2) to apply Delaware substantive law in determining whether there was an "air pollution" violation under the decree.

Respondent suggests that the procedural limitations petitioner assumed the Director would follow are so unusual as to be incredible. However, these procedural limitations are far from extraordinary in air pollution proceedings. Indeed, the State of Maryland, the state in which petitioner's plant is located, recently enacted air pollution legislation containing precisely the limitations petitioner had in mind. Md. Stat. Ann., art. 43, §§ 690, 698 (1967).

In retrospect it may be said that petitioner made a mistake in not insisting on a more specific decree. However, this kind of mistake is not uncommon. It has given rise to thousands of disputes relative to the interpretation of private agreements and has also given rise to a body of principles governing the interpretation of agreements. Under the reasoning of the lower courts and respondent,

there would never be a legitimate private contract dispute involving interpretation and meaning. Nor would a private party's interpretation of a consent decree ever prevail over the government's interpretation. All of the responsibility for ambiguities in a decree are assumed by the private party even where, as here, the government is the drafter of its language. Such a view is of course contrary to private contract law. 3 Corbin on Contracts, § 559, pp. 262-67; § 537, pp. 48-49; § 538, pp. 57-61; 64-70.

Respondent's position is that in interpreting consent agreements the government's view of the requirements of the public interest must prevail over the intent of the parties. This method of interpreting consent agreements is in direct conflict with this Court's ruling in *United States v. Atlantic Refining Co.*, 360 U. S. 19 (1959). If this method of interpretation is permitted to stand, it will tend to discourage consent settlements of government regulation claims and thereby tend to destroy a crucial means of effective and efficient administration and enforcement of government regulation laws. For a more detailed discussion, see Petition for Writ of Certiorari, pp. 15-19.

With respect to the second question, respondent takes the position that the Director's air pollution determination is a finding of fact which is not clearly erroneous and therefore should not be "disturbed." This is a familiar strategy designed to defeat appellate review. If you win at the trial level, on appeal characterize the issue as one of fact because of the limited scope of review of findings of fact.

Respondent's characterization of the issue, just as the court of appeals' characterization, is patently wrong. Petitioner does not and has not challenged the factual finding of the Director and the district court that during the period May 19, 1969 to August 24, 1969, there were 31 reports of malodors in the Selbyville, Delaware area. Petitioner

raises a question of law: Whether the Director and the district court in making the air pollution determination should have taken into account factors other than the frequency of reported malodors. In its Petition for Writ of Certiorari, petitioner pointed out that this case represents a test case for the government; that it is one of first impression in an increasingly important area of law; that the decision of the courts below threaten to begin the development of this new area of the law on an unsound basis; and that under the legal standards adopted by the courts below most of the plants in the country would be guilty of an air pollution violation. For a more detailed discussion of these points, see Petition for Writ of Certiorari, pp. 19-26.

The Court of Appeals' misapplication of Rule 52(a) of the Federal Rules of Civil Procedure in itself raises a substantial question appropriate for this Court's review. The Court of Appeals' interpretation of the clearly erroneous rule places it in direct conflict with the interpretation of other Circuits. See Petition for Writ of Certiorari, p. 22.

Respondent has conveniently ignored the points made by petitioner. Instead of addressing itself to the merits, it has chosen to attempt to persuade the Court that petitioner has in bad faith endeavored to delay the only just outcome, *i.e.*, the closing of petitioner's plant. The admission implicit in this choice of advocacy speaks for itself. On the matter of delay, the petitioner has acted promptly throughout these proceedings. Of course, any time a party is not willing to surrender and exhausts the legal remedies available, a final decision may take years as it has here.

Respondent has sought to impose on petitioner costly and untried odor control systems and devices. Petitioner has resisted because the costs were prohibitive, and there was no guarantee of success. Petitioner, however, took other steps to control malodors. It eliminated two-thirds

of the odor-producing materials. This was effective in eliminating malodorous air pollution. But, apparently because this is a test case under the Clean Air Act, the government has effectively ignored this and pressed for a closing of petitioner's plant.

Respectfully submitted,

RALPH J. SAVARESE,
JOHN PAUL CURRAN,
Attorneys for Petitioner.